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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-6293

PHILIP J. GOLDBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 4

STATEMENT OF THE CASE 6

A. Background of Petitioner 7

B. FSL'S Operations – An Overview 8

C. The Scheme Charged in the Indictment 10

D. The Government's Key Witness – Edwin S. Newman 12

1. Newman's "Deal" Required a Complete Statement Prior to His Trial Testimony 13

2. Newman's Testimony on Direct Examination 15

3. The Facts Established at the Time of Petitioner's Requests for the Prosecutors' Notes 18

4. The Government Switched Theories in the Courts Below Re Why the Notes Were Not Compellable 21

SUMMARY OF ARGUMENT 25

A. Disclosure of the Prosecutors' Notes Was Required Under the Jencks Act 26

B. The Due Process Clause Compels Disclosure of the Prior Statements of the Prosecution's Chief Witness 30

Page

ARGUMENT

I. THE TRIAL COURT'S SUA SPONTE RULING THAT THE "WORK PRODUCT" PRIVILEGE PRECLUDED DISCLOSURE OF THE PROSECUTORS' NOTES, AND ITS REFUSAL TO CONDUCT AN IN CAMERA INSPECTION, TAKE EXTRINSIC EVIDENCE, AND MAKE THE NOTES PART OF THE RECORD, IS REVERSIBLE ERROR 34

A. There Is No "Work Product" Exception to the Jencks Act 34

B. The District Court Erroneously Denied Petitioner's Request for An In Camera Inspection of the Prosecutors' Notes 41

C. The Failure of the Trial Court To Examine and Disclose to the Defense the Witness' Statements Was Prejudicial Error Requiring A New Trial 46

II. THE TRIAL COURT'S REFUSAL TO COMPEL DISCLOSURE OF MATERIAL RELEVANT TO THE PROSECUTION'S CHIEF WITNESS VIOLATED PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS 54

A. The Due Process Clause Requires Production of Impeaching Documents and Materials in the Prosecutors' Possession 58

B. The Compulsory Process and Confrontation Clauses Require Production of Impeaching Materials in the Prosecutors' Possession Upon Timely Demand 64

1. The compulsory process clause requires the prosecution to produce possible impeachment materials upon timely demand by a defendant 66

Page

2. Effectuation of petitioner's right to meaningful confrontation of the witness Newman required production of possibly impeaching materials 69

CONCLUSION 73

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Alcorta v. Texas, 355 U.S. 28 (1957) 62

Alexander v. United States, 390 F.2d 101 (5th Cir. 1968) 54

Alford v. United States, 282 U.S. 687 (1931) . 33, 52, 69, 70, 71

Bary v. United States, 292 F.2d 53 (10th Cir. 1961) 43, 48

Barber v. Page, 390 U.S. 719 (1968) 69

Bond v. United States, 397 F.2d 162 (10th Cir. 1968), *cert. denied*, 393 U.S. 1035 (1969) 24

Brady v. Maryland, 373 U.S. 83 (1963) ..... *passim*

Brookhart v. Janis, 384 U.S. 1 (1966) 71

Campbell v. United States (I), 365 U.S. 85 (1961) .. 28, 42, 43, 44, 45

Campbell v. United States (II), 373 U.S. 487 (1963) 42, 50

Carnley v. Cochran, 369 U.S. 506 (1962) 52

Clancy v. United States, 365 U.S. 312 (1961) . 28, 30, 44, 48, 53

Coleman v. Maxwell, 273 F. Supp. 275 (S.D. Ohio 1967) 61

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 54

Davis v. Alaska, 415 U.S. 308 (1974) ..... *passim*

Dennis v. United States, 384 U.S. 855 (1966) 63

Erckman v. United States, 416 U.S. 909 (1974) 49

Flores v. Craven, 503 F.2d 1030 (9th Cir. 1974) 64

Giglio v. United States, 405 U.S. 150 (1972) 30, 55, 58

	Page
Giles v. Maryland, 386 U.S. 66 (1967)	58
Gordon v. United States, 344 U.S. 414 (1953)	68
Government of the Virgin Islands v. Lovell, 410 F.2d 307 (3d Cir. 1969), *cert. denied*, 396 U.S. 964 (1969)	50, 51
Greene v. McElroy, 360 U.S. 474 (1959)	53, 69
Hickman v. Taylor, 329 U.S. 495 (1947)	27, 37
Hormel v. Helvering, 312 U.S. 552 (1941)	54
In re Oliver, 333 U.S. 257 (1948)	69
Jencks v. United States, 353 U.S. 657 (1957)	*passim*
Johnson v. Johnson, 375 F. Supp. 872 (W.D. Mich. 1974)	67
Johnson v. Zerbst, 304 U.S. 458 (1938)	52
Kirby v. United States, 174 U.S. 47 (1899)	69
Krilich v. United States, 502 F.2d 680 (7th Cir. 1974)	70
Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967)	64
Mattox v. United States, 156 U.S. 237 (1895)	69
Nardone v. United States, 308 U.S. 338 (1939)	26
Ogden v. United States, 303 F.2d 724 (9th Cir. 1962)	41, 43, 44
Palermo v. United States, 360 U.S. 343 (1959)	*passim*
Pointer v. Texas, 380 U.S. 400 (1965)	69
Rosenberg v. United States, 360 U.S. 367 (1959)	*passim*
Saunders v. United States, 316 F.2d 346 (D.C. Cir. 1963)	26, 36, 40, 43, 54
Scales v. United States, 367 U.S. 203 (1961)	48
Smith v. Illinois, 390 U.S. 129 (1968)	33, 53, 69, 71
Turner v. Louisiana, 379 U.S. 466 (1965)	69

	Page
United States v. Aaron, 457 F.2d 865 (2d Cir. 1972)	49, 70
United States v. Ahmad, 53 F.R.D. 186 (M.D. Pa. 1971)	64
United States v. Augenblick, 393 U.S. 348 (1969)	32, 66
United States v. Aviles, 315 F.2d 186 (2d Cir. 1963)	36
United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971)	31, 60
United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807)	32, 67
United States v. Burr, 25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807)	67
United States v. Chitwood, 457 F.2d 676 (6th Cir. 1972), *cert. denied*, 409 U.S. 858 (1972)	42, 43
United States v. Cleveland (I), 477 F.2d 310 (7th Cir. 1973)	49
United States v. Cleveland (II), 507 F.2d 731 (7th Cir. 1974)	70
United States v. Hilbrich, 341 F.2d 555 (7th Cir. 1965)	36
United States v. Missler, 414 F.2d 1293 (4th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970)	28, 48, 70
United States v. Nobles, ____ U.S. ____, 95 S. Ct. 2160 (1975)	27, 39, 40
United States v. Nixon, 418 U.S. 683 (1974)	*passim*
United States v. Reynolds, 345 U.S. 1 (1953)	31, 63
United States v. Scaglione, 446 F.2d 182 (5th Cir. 1971), *cert. denied*, 404 U.S. 941 (1971)	42
United States v. Schneiderman, 106 F. Supp. 731 (S.D. Cal. 1952)	67

	Page
United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974)	36, 50, 51
United States v. Wilkins, 326 F.2d 135 (2d Cir. 1964)	59
United States v. Wright, 489 F.2d 1181 (D.C. Cir. 1973)	62
Washington v. Texas, 388 U.S. 14 (1967)	65
Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964)	28, 46, 47
Other Authorities:	
Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 *U. Chi. L. Rev.* 112 (1972)	63
C. McCormick, Evidence § 34 (1972)	72
Note, *"Work Product" in Criminal Discovery*, 1966 *Wash. U.L.Q.* 321 (1966)	36, 38
Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts, 62 F.R.D. 271 (1974)	38
Ratner, *The Function of the Due Process Clause* 116 *U. Pa. L. Rev.* 1048 (1968)	63
1957 U.S. Code Cong. & Admin. News 1861	35
1970 U.S. Code Cong. & Admin. News 4017	35
Westen, *The Compulsory Process Clause*, 73 *Mich. L. Rev.* 71 (1974)	32, 67
1 *J. Wigmore, Evidence* § 18 (3d ed. 1940)	24
Constitution, Statutes and Rules:	
United States Constitution:	
Fifth Amendment	*passim*
Sixth Amendment	*passim*
18 U.S.C. § 3500 (The Jencks Act)	*passim*

	Page
Federal Rules of Criminal Procedure:	
Rule 16	38
Federal Rules of Civil Procedure:	
Rule 26(b) (3)	38

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OPINION BELOW

The Memorandum Opinion of the Court of Appeals, which was directed by that court not to be published in the Official Reports, is set forth at pages 113 through 123 of the Appendix. The order denying petitioner's petition for rehearing is at page 124 of the Appendix.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. Its judgment was entered on December 18, 1974. On February 6, 1975, the Court of Appeals denied a petition for rehearing with a suggestion for rehearing en banc. (Ap. 124) By order of March 5, 1975, Mr. Justice Brennan extended the time for filing a petition for writ of certiorari to and including April 5, 1975. The petition was filed April 3, 1975, and certiorari was granted on June 16, 1975. (Ap. 125)

QUESTIONS PRESENTED

This case presents the issue of a defendant's entitlement upon timely motion to the notes of the prosecutors which reflect statements made to them by a key Government witness in interviews prior to that witness' trial testimony.

The witness, Edwin S. Newman, whose interview notes were sought by petitioner, was a co-defendant in the scheme charged in the indictment, and immediately prior to trial entered into a deal with the Government whereby he was to give the prosecution a complete statement under oath of all the details relating to the indictment and to testify at trial "in conformity" with that statement.

At the prosecutors' first interview with Newman, a reporter was present, and a transcript of that testimony was furnished petitioner. The prosecutors concluded

that first session with the express acknowledgment that there were additional matters about which Newman would be questioned at a later time. Thereafter, Newman met with only the prosecutors on five different days, spending in excess of 40 hours total in these meetings. During the interviews, the prosecutors took notes which they from time to time read back to Newman; Newman sometimes corrected their read-backs. These prosecutors' notes were "often prepared after lengthy conversations occurred and a mutual understanding of the factual situation had been reached."

After Newman's testimony on direct examination, petitioner on three separate occasions, under the authority of the Jencks Act and the rationale of *Brady v. Maryland*, requested production of these notes in connection with his cross-examination of Newman. The trial court refused to even inspect the notes – let alone order them produced – on the basis that the notes were "work product of the attorneys" and thus insulated from production under the Jencks Act and *Brady*.

These "notes" have never become a part of the record of the proceedings in this case. Although the Government argued in its brief to the Circuit Court that the notes were part of the record, at oral argument before the Ninth Circuit, more than a year after the trial, the Government conceded they were not part of the record. One of the prosecutors then presented a batch of papers and requested permission to "lodge" these with the Panel. He described this packet as all the notes he could then find. The Ninth Court permitted them to be lodged. In its unpublished opinion, the

Circuit did not meet the work product issue, but instead held that the notes were "not statements of the *defendant* within the meaning of 3500(e)." Petitioner had never contended they were his statements, but rather statements of the witness, Newman. The Court of Appeals, based on materials which were not part of the record, found no clear, prejudicial error in the actions of the trial court.

The questions as to which this Court granted the writ are as follows:

> Whether 18 U.S.C. § 3500, the Jencks Act, contains an "attorney's work product exception"; and whether a Government attorney's notes of conversations with the key Government witness, to whom the prosecutors read back their notes from time to time, where the witness corrected same, which notes were prepared "only after lengthy conversations had occurred and a mutual understanding of the factual situation" had been reached, if not compellable under the Jencks Act, are compellable under the doctrine of *Brady v. Maryland*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Amendment V to the United States Constitution provides in pertinent part:

> "No person * * * shall * * * be deprived of life, liberty, or property, without due process of law * * *."

2. Amendment VI to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor * * *."

3. 18 U.S.C. § 3500, the Jencks Act, provides in pertinent part:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> "(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such

procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge.

* * *

"(e) the term 'statement' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means –

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

STATEMENT OF THE CASE

In October, 1970, a 17-count indictment was filed in the United States District Court, District of Arizona, Phoenix Division, charging petitioner PHILIP J. GOLDBERG and codefendants, EDWIN S. NEWMAN, EMIL TUCKER, WILLIAM MILES SKILLMAN, and ROBERT STANLEY CLARK, with violations of 18 U.S.C. § 1341, the mail fraud statute. Codefendants

Tucker, Skillman and Clark all pleaded guilty to at least one count of the indictment. Tucker and Skillman were sentenced before and Clark was sentenced after petitioner's trial. (Ap. 4, 8 and 30)[1] Immediately prior to trial, the Government dismissed three of the 17 counts of the indictment and, pursuant to an agreement with codefendant Newman, severed his case from petitioner's. (Ap. 48)[2] Petitioner's jury trial commenced May 22, 1973, and concluded on July 14, 1973, when the jury found him guilty on all 14 counts. (Ap. 28)

On October 5, 1973, petitioner was sentenced to a term of two years imprisonment on each of the 14 counts of which he was convicted, the prison terms to be served concurrently, and a fine of $1,000 on each of the counts. (Ap. 111) The Court of Appeals affirmed petitioner's conviction on 13 of the 14 counts, and reversed his conviction on count 10 because of insufficient proof of mailing. (Ap. 123)

A. Background Of Petitioner

Petitioner Philip J. Goldberg had been in the insurance business since 1951 when he commenced selling life insurance in New York. (R.T. M21)[3] He

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[1] "Ap." refers to the Appendix.

[2] Newman's case never went to trial, as the indictment against him was dismissed on December 17, 1973. (Ap. 32)

[3] "R.T." refers to the Reporter's Transcript which is in 15 volumes, each volume containing a separate letter designation and lettered as Volumes A through O. "C.T." refers to the Clerk's Transcript, which is in two volumes: Vol. I, pages 1-253; and Vol. II, pages 255-580. "Ex." refers to exhibits. Pages 57 through 80 of the Appendix contain an index to the Reporter's Transcript.

achieved considerable success and by 1961 had sold or placed in force $200 million worth of life insurance. (Ex. U13 [R.T. K294] and 19F [E204]) In 1962, petitioner became chairman of the board of Hamilton Life Insurance Company, a national publicly held company.[4]

Petitioner was regarded as an innovator of techniques and concepts in the insurance field, having been the architect of the concept of a "holding", operating company for affiliated life insurance companies," which concept had been adopted by almost every major life insurance company by the late 1960's. (R.T. M24-26)

In late 1965, petitioner and his family moved to Phoenix. Petitioner acquired all the outstanding stock of Financial Security Life Insurance Company ("FSL") and served as FSL's president until 1969. It was FSL's issuance of single premium annuity policies while petitioner owned and controlled it that formed the gravamen of the indictment.

B. FSL's Operations – An Overview

By late 1967, FSL was a full reserve life insurance company chartered in Arizona, having in excess of $112

[4]In addition to his activities in the insurance field, petitioner served as an economic assistant to the United States Ambassador to the United Nations. He had written various books and articles about life insurance, estate planning and related subjects. (Ex. Q9 [R.T. K262], Q10 [R.T. K262], U15 [R.T. N75], U16 [R.T. N75], U17 [R.T. N75], U49 [R.T. N76], and U50 [R.T. N76].) He was in all respects an acknowledged expert in the insurance field and served on the faculty of Purdue University, as well as being a trustee of the N.Y.U. Law School. (R.T. M31) (Ex. U14, U16 and 19F [R.T. E204].)

million worth of life insurance in force. (Ex. 1C, p. 15 [R.T. A307]) It commenced issuing single premium annuity policies to various individual annuitants. Petitioner's concept was that an executive could exchange restricted assets, such as lettered stock, for an annuity policy; the effective commencement pay-off date of the policy would coincide with the lifting of the investment restrictions on the stock, so that FSL could sell the stock and, in the intervening period, the annuitant would have a fully paid policy to be used for various purposes, including collateral for loans. (R.T. M80-82)

In the majority of instances, FSL took from the annuitant as payment for the annuity policy a premium note in the face amount of the policy. A premium note is legitimate and proper payment for a policy. (R.T. B223-24) The note, in turn, was usually guaranteed by a Colorado holding company, Financial General Capital Corporation ("FGCC"). FGCC was a corporation in which petitioner owned the controlling interest. To induce FGCC to guarantee the premium note to FSL, the annuitant was usually required to transfer to FGCC lettered stock at double the amount of the premium note to FSL. The conveyance of the stock to FGCC was coupled with an agreement whereby FGCC could sell the stock after a stated period to fund its guarantee to FSL of the annuitant's premium note, and usually contained a provision enabling the annuitant to buy back the stock at a higher price than that at which it was valued at the time of transfer to FGCC.

Concurrently with the execution of the premium note, the annuitant was required to execute a "reservation of benefits and proceeds rider" which

provided that, as between FSL and the annuitant, the value of the policy was reduced by the amount of the outstanding premium note.

The annuitant would utilize the annuity policy to collateralize a new or existing loan from a lender. (R.T. K326-336) (Ex. Q16 [R.T. K326]) When the lender would inquire of FSL as to the value of the annuity policy, FSL would inform the lender that the policy was fully paid, that there were no liens or encumbrances against the policy, and that the face value of the policy was the cash surrender value of the policy. Because FSL did not necessarily follow the same procedure with regard to the issuance of all the policies, variations evolved as time went on. (Ex. U54(1) – (16) [R.T. N182]; Ex. U52 [R.T. N167]; Ex. 10M [R.T. F222])

On April 18, 1969, after a New York bank seized the proceeds of its statutory deposit, FSL was suspended by the Arizona Insurance Commissioner. (R.T. B252-256) FSL was prohibited from conducting any further business. (R.T. B256 and L391) After protracted litigation with the Insurance Commissioner through the summer of 1969, the company was ultimately put into receivership. (R.T. L388) (Ex. 3NN [R.T. A308])

C. The Scheme Charged in the Indictment

The indictment (Ap. 33) alleges that commencing January 20, 1968, through January 9, 1970, petitioner and his four co-defendants devised a scheme for obtaining money by false statements to lending sources that could be induced to loan money and to take

single-premium annuities of FSL as collateral to secure the repayment of such loans; that in execution of this scheme, petitioner and his codefendants caused annuity policies to be used to borrow money from persons, banks and other lending sources, and that as to these persons "that made and considered making loans" to be collateralized with single-premium annuity policies issued by FSL, defendants caused the following false statements to be made:

(a) That the premiums were paid in full on the annuity policies – whereas, no payments except interest payments had been made on the promissory notes accepted by FSL.

(b) There were no liens or encumbrances of record against single-premium annuity policies offered as collateral – whereas, the reservation of benefits and proceeds riders reduced the policies to zero.

(c) That the face amount of the policy was the cash surrender value that would be paid to the annuitant after the due date specified in the policy – whereas, said policies were worthless.

That defendants withheld and concealed from the lenders the material facts that promissory notes had been accepted by FSL in payment of premiums, and that the policies were subject to riders providing that the policies would be reduced by the total amount unpaid.

That when these policies were issued by FSL "and accepted by lenders as collateral" and presented for payment, the lenders would be informed that no amounts were payable because no payments had been made on the promissory note.

The 14 count mailings of the indictment upon which petitioner was tried involved annuities issued to six

individuals. Two of the codefendants, Clark and Skillman, received annuities. Tucker arranged for the placement of some annuities. Newman was the vice president and a director of FSL and president of the holding company, FGCC.

Petitioner's defense was that the annuity concept was lawful and proper; that he relied upon his attorneys, including Newman, to insure the legitimacy of the program, and that his attorneys, including Newman, drafted the form of responses to the lenders; that FSL, rather than acting in concert with Skillman as the indictment alleged, had in fact been defrauded by Skillman, who had perverted the annuity concept for Skillman's own financial gain, and in the process bilked FSL of over a million dollars.

D. The Government's Key Witness – Edwin S. Newman

Edwin S. Newman, who at trial testified he was then the "legal and reference editor" for Oceana Publications (R.T. J127), was the only codefendant who had been an officer, director or employee of FSL. Newman had been intimately associated with petitioner in the capacity of a lawyer and executive officer of various companies with which petitioner had been affiliated for over a decade. (R.T. G127-28)[5]

[5]Newman had been associated with petitioner in his various insurance businesses from 1959 through 1969. Under the terms of his initial employment contract dated December 1, 1959, with Philip J. Goldberg Associates, Newman's duties were to include: "serving as house counsel to Philip J. Goldberg, and Philip J. Goldberg Associates, including the furnishing of legal advice." (Ex. U31 [R.T. N84].)

1. Newman's "Deal" Required a Complete Statement Prior to His Trial Testimony

Four days before petitioner and Newman's trial was then scheduled to commence,[6] Newman entered into a most unusual written plea agreement with the Government. (Ex. Q-3 for identification; Ap. 48) The agreement provided that if *petitioner entered a guilty plea*, Newman would be permitted to plead to two misdemeanor tax counts, but if *petitioner went to trial*, Newman would plead to one count of the indictment. Under the terms of this agreement:[7]

1. Newman was required to "give the United States a *complete* statement under oath concerning those events which are the subject for prosecution in CR-70-517-PHX.WPC."

2. The Government was to sever Newman's case from petitioner's, and Newman was to "testify as a witness for the United States, said testimony *being in*

[6]The trial was scheduled to commence on May 15, 1973. However, on May 14, 1973, for the first time and after repeated previous denials, both on and off the record, the Government finally admitted to electronic surveillance of petitioner after petitioner filed a copy of an article from the *New York Times* which revealed the surveillance. (C.T. 250-255) After a hearing on May 14, 1973, the court continued the trial for production of the fruits of the surveillance, which included 17 tapes, each approximately one hour in length, of conversations of defendant with various persons, including his attorneys, between January 25 and March 6, 1973. (C.T. 353) The trial was then continued to May 23, 1973, when it commenced. (R.T. A115-141)

[7]Petitioner unsuccessfully attempted to have this agreement (Ex. Q3 for identification) received in evidence. The court upheld the prosecutor's objections, but did permit counsel to question Newman about it. (Ap. 83-84)

conformity with the statement having been given to the United States Attorney under oath before trial."

3. If Newman failed to honor the terms of that agreement, "upon the conclusion of a trial of Philip J. Goldberg which results in a conviction, that the United States shall use . . . [his] pretrial statement under oath as well as . . . [his] testimony at the trial of Philip J. Goldberg against . . . [him] in a subsequent trial. . . ."

On the same day that the plea agreement was dated, May 11, Newman participated in a 2-½ hour question and answer session with two attorneys for the Government and his own counsel, at which a reporter was present. Newman's testimony briefly touched upon some of the transactions alleged in the indictment. This session concluded with the prosecutor's observations:

> "For the record, the time is now 4:30. We have not exhausted all the transactions of which Mr. Newman can testify.
>
> * * *
>
> "We intend to continue this discussion off the record at a later time this weekend, and there are individuals . . . as well as the Goldberg transactions . . . which will be explored at a further time." (Ap. 52)

Thereafter, Newman met with just the two prosecutors, Messrs. Lebowitz and Keilp, on May 13, June 9, 10, 16 and 17.[8] (Ap. 90-91)

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[8]The Government in its brief to the Ninth Court stated that the number of the prosecutors' hours with Newman in these conferences was "in excess of 40 total hours spent." (Brief for Appellee at 63, *United States v. Goldberg*, No. 74-1023 (9th Cir. 1974) [hereinafter cited as Appellee's Ninth Circuit Brief])

2. Newman's Testimony on Direct Examination

Newman was the thirty-fifth and last witness called by the Government in its case in chief.

Newman was an honor graduate of Columbia Law School, and a member of the New York Bar since 1943. From 1960 through 1969, Newman served in various capacities with companies with which petitioner was affiliated. (R.T. J127-130; K130-136; K140-142) (Ex. Q1 [R.T. K139] In 1966, he moved from New York to Phoenix, where he became Vice-Chairman of the Board of FSL and President of FGCC. (R.T. J130) Newman was a signatory to all correspondence emanating from FSL to lenders, and all but two of the count mailings from FSL were executed and sent by or to him.[9] It was Newman who, after consulting with a Phoenix attorney, provided the form of responses to the lenders which were utilized by FSL and ultimately resulted in petitioner's indictment. (R.T. J341-345) During trial the judge as well as the prosecution described the correspondence which emanated from Newman as the crux of the Government's case. (R.T. 0123 and K21)

Newman's testimony on direct examination commenced on Friday, June 22 (R.T. J126), and concluded on Wednesday, June 27. (R.T. K118) On direct examination his testimony spanned 440 pages.[10] It was

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[9]Ct. 1 - Ex. 5N [R.T. B159]; Ct. 3 - Ex. 6A [R.T. D258]; Ct. 4 - Ex. 8B [R.T. E396]; Ct. 5 - Ex. 7A [R.T. D306]; Ct. 6 - Ex. 7B [R.T. E 124]; Ct. 7 - Ex. 10A [R.T. F244]; Ct. 8 - Ex. 11A [R.T. D40]; Ct. 9 - Ex. 7C [R.T. E121]; Ct. 10 - Ex. 13A [R.T. H297]; Ct. 12 - Ex. 10B [R.T. F246]; Ct. 14 - Ex. 16F [R.T. H412]; Ct. 16 - Ex. 5Y [R.T. B159].

[10]Newman's redirect examination covered 60 pages; he was the sole Government witness on rebuttal. (R.T. N377)

on Newman's testimony that the Government relied to prove the alleged knowledge and scienter of petitioner. It was through Newman's testimony on direct that the prosecutors tied the working of the alleged illegal scheme to petitioner. Newman's signature was on practically every piece of correspondence that emanated from FSL, and he was the individual in most cases who negotiated with the lenders and answered their inquiries. (*See* footnote 9, *supra*.) On Direct examination, in essence Newman admitted that he had known the responses were illegal and testified that he "felt guilty about sending the letters out" (R.T. K30), and then attempted to attribute that knowledge to petitioner through alleged conversations with petitioner.[11] Newman purported to testify on direct examination practically in *ipsissimis verbis* to 91 conversations he allegedly had with petitioner.

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[11]Newman so testified specifically with regard to a host of correspondence, over petitioner's vigorous objections. E.g.:

Re Exhibit	*R.T. Pages*
Ex. 10D-14	K28-32
Ex. 10F	K33
Ex. 3I-56(7), (8a)	K35-39
Ex. 7B, 7C	K41-43
Ex. 7G	K45-49
Ex. 7C, 7F	K49-51
Ex. 10A	K51-56
Ex. 12	K56-60
Ex. 20B, 3Z	K64-69
Ex. 20A	K69-74
Ex. 10B, 19A	K74-78
Ex. 16C	K79-82
Ex. 16D - F	K82-88
Ex. 12G, 3T-39	K94-108
Ex. 3L-69	K108-111
Ex. 32B	K112-117

The trial testimony of Newman on direct examination ranged far afield of the matters he touched upon in the May 11, 1973, statement, not only as to matters discussed, but the details of the transactions. (Ap. 90) Compared with his trial testimony, the May 11 statement barely scratched the surface, as the following summary reflects:

	Newman's May 11 Statement	Newman's Direct Testimony
Pages	90	392
Ipsissimis verbis conversations with petitioners	8	91
Trial exhibits mentioned or discussed	27	67
Transcript pages of exhibit discussion	67	373
Pages mentioning or discussing transactions with annuitants or lenders	75	317
Individual or corporate lenders, or annuitants, not mentioned in May 11 statement:		
Royal Bank		46
Mr. Brickey		10
Franklin/Williams/Peters		16
Messrs. Friedman & Potter		10

Exhibit 1 to this brief sets out with particularity the specific transcript pages and exhibits referred to above.

3. The Facts Established at the Time of Petitioner's Requests for the Prosecutors' Notes

Shortly after petitioner's commencement of cross-examination of Newman on June 27, it was established that:

1. Newman, following his May 11 statement, had met with the prosecutors for interviews in connection with his trial testimony on at least five different days prior to his testimony on direct examination. (Ap. 90-91)

2. No reporter was present at these meetings with the two prosecutors, Messrs. Lebowitz and Keilp, and neither of the two postal inspectors who assisted the prosecution both prior to and during the trial was present. Only Newman and the prosecutors were present. (Ap. 90-93)

3. During the interviews, the prosecutors took notes which they read back to Newman from time to time and Newman would correct them. (Ap. 92)

4. These notes were often prepared only after lengthy conversations had occurred and a mutual understanding of the factual situation had been reached.[12]

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[12]This characterization was not adduced in those words at trial, but it was the Government's characterization of the events giving rise to the preparation of these notes in its brief (Appellee's Ninth Circuit Brief at 64).

Accordingly, petitioner moved for production of the notes under the Jencks Act, 18 U.S.C. § 3500. The court, without waiting to hear from the Government or even inspecting the notes stated: "Aren't these attorney's work product, notes of interviews with witnesses, just like yours are? Denied." (Ap. 94)

When petitioner attempted to argue the applicability of the Jencks Act, *the court insisted* that a work product privilege protected these notes from discovery by a defendant and noted that petitioner had already received the statement of the witness taken May 11, 1973. In denying that motion, the trial judge, without an examination of the notes, concluded that the notes necessarily contained the attorneys' impressions, plans and strategy, and insisted that the work product privilege applied.

The court was proceeding on the premise that the May 11 statement was Newman's complete statement. In an effort to dispell that incorrect assumption, petitioner then directed the court's attention to the prosecutor's comments at the end of the May 11 statement that the interview would be continued at a later time and cover other matters not noted on the statement and simultaneously filed the May 11th statement as Motion Exhibit A. (Ap. 94-95) Petitioner argued that he had made a prima facie case since the witness admitted that the Government attorneys were taking notes which they read back to the witness. The court refused to reconsider its ruling until petitioner found a case that held an attorney's notes were compellable under Jencks.[13]

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[13]Ap. 94:

"THE COURT: Until you put your finger on one that goes directly to this issue, the motion is denied, pending

At the opening of trial the next day, Thursday, June 28, while Newman was still on the stand, petitioner again moved for the notes under the Jencks Act, stating:

> ". . . Your Honor, the objection that has been raised by the Court has been that the materials constitute attorney's work product. I don't know how your Honor could make that observation unless you personally inspect whatever documents or notes the Government counsel have in their possession." (Ap. 97)

The court responded that there was no question about the fact that the notes were made by an attorney while interviewing a witness. Petitioner observed that he had done some limited research and had not found any case that said notes taken by an attorney are not compellable. The court thereupon stated:

> "The question isn't whether they are compellable; the question is are they compellable.
>
> "MR. SMALTZ: No, sir, but I didn't find one that says they are not. And the Jencks Act–" (Ap. 97)

At this point the court cut off the discourse and instructed counsel that the trial would proceed and that petitioner was to prepare a memorandum for Monday, July 2. Petitioner agreed and again requested the court to examine the notes in camera. The court again declined to inspect the notes. (Ap. 98)

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reopening if you can get me some authority for use of attorney's work product in interviewing a witness, with his impressions, plans, his strategy and the witness' testimony, when you have already got reduced to testimony a statement of the witness, that this attorney's notes in preparation for trial should be discoverable."

The following Monday, July 2,[14] petitioner filed with the court a memorandum requesting production of Newman's statements under both the Jencks Act and *Brady v. Maryland* and its progeny. (Ap. 53-56) Petitioner was not able to cite a case which held that an attorney's notes were compellable under the Jencks Act. The memorandum noted, *inter alia*, that the Jencks Act itself did not provide a work product exception, and that even in civil cases the work product doctrine gave way upon an appropriate showing of need. The memorandum renewed petitioner's request for an in camera inspection and, after same, a reconsideration by the court of the matter.

The court, again without ever looking at the notes, upheld the work product objection then made for the first time by the Government (discussed *infra*), and denied petitioner's motion for production of the notes under the authority of 18 U.S.C. 3500 and the *Brady* doctrine. (Ap. 99) Thus, the notes were *never* examined in camera and *never* made a part of the record.

4. The Government Switched Theories in the Courts Below Re Why the Notes Were Not Compellable.

When petitioner first requested the prosecutors' notes on June 27, the Government said nothing about their position on the matter. (Ap. 94-95) Similarly, on the next day, when petitioner renewed his request, the Government remained silent. (Ap. 97-98) No response

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[14]By this time, Newman was no longer on the stand, cross-examination having been completed on Friday, June 29, 1973.

to petitioner's memorandum of July 2 was filed by the Government, but at the hearing on that motion, the Government counsel announced from the podium (not from the witness stand) for the first time that these notes:

> "... were merely our notes which reflect substances of conversations, our impressions, certain entries that would be classified as trial strategy. They were not taken down verbatim. They were not shown to the people that we were interviewing. Nobody was asked to sign them in the form of a signed statement, and *we feel that it is properly the work product of counsel and we would stand on that.*" (Ap. 98; emphasis added.)

Government counsel had obviously taken their cue from the court's previous observations and were maintaining that the work product doctrine precluded production.[15]

In the Government's brief to the Court of Appeals, however, it abandoned the "work product" claim as a basis for non-compliance with petitioner's request, stating:

> "The appellee does not quarrel with the holding that handwritings or notes by an Assistant U.S. Attorney which constitute a 'statement' should be delivered to the defense at the appropriate time under the provisions of the Jencks Act." (Appellee's Ninth Circuit Brief at 64).

The Government thus shifted to a new ground from that advanced below, *viz.*, that the prosecutors' notes

[15]The Government did not deny that the notes were read back to Newman and corrected by him.

did not constitute statements of the witness Newman within the meaning of § 3500(e). (*Id.* at 65)[16] In making this new "objection" the Government argued:

(i) Since petitioner had been furnished with the May 11, 1973, statement and since Newman spent in excess of 40 hours total conference time and the attorneys' notes were allegedly less than the 89 pages of the May 11 transcript, the defendant obviously wasn't prejudiced by failure to have the attorneys' notes. (*Id.* at 62-63)

(ii) That since Newman "did far more than answer questions . . . he helped the Government attorneys in drafting questions to be asked of him and other witnesses . . . suggest[ed] areas of cross-examination . . . in the event [petitioner] testified . . . explained . . . almost endless numbers of letters, documents and other pieces of physical evidence . . . and provid[ed] invaluable insight into the personality and past history of Philip Goldberg" the notes did not reflect the "complex degree of conversation" preceding their recordation. (*Id.* at 64)

(iii) That the notes lacked sufficient specificity for a foundation to use as a prior inconsistent statement. (*Id.* at 64)

(iv) That petitioner did not prove that the entirety of the notes was read back and that "the record suggests by virtue of the questions propounded by the defendant only a partial reading occurred." (*Id.* at 66)

[16]The Government in its brief to the Circuit Court argued that the notes had been examined and made a part of the record by the trial court. (Appellee's Ninth Circuit Brief at 64.) At oral argument, it abandoned this contention and then lodged with the Circuit Court the packet of notes which prosecutor Lebowitz said were all the notes he could then find.

(v) That petitioner had "lengthy, wide-open cross-examination . . . [which was] more than sufficient, *had the jury been inclined to ultimately view the defendant himself as being credible*. . . ." (*Id.* at 67)

Apart from the issue of whether the Government can change theories for withholding the materials[17] which, had they been advanced at trial, petitioner would at least have had an opportunity to refute or clarify, the Government's arguments demonstrated a dismal incomprehension of the plain language, legislative purpose, and this Court's interpretations of the Jencks Act. Nowhere in its brief to the Circuit did the Government ever address itself to petitioner's contention that the trial court refused to inspect the documents, which is required once a defendant demonstrates the existence of possible statements; and, most importantly, apart from the Jencks Act, the Government never refuted petitioner's argument that the prosecutor's notes under the particular circumstances of this case were compellable under *Brady* and its progeny. (*Id.* at 62-67)

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[17]Petitioner submits that it is improper for the Government to withhold production of these notes on one theory, and then on appeal to expressly abandon that theory and assert a new and different basis for nonproduction. *See Bond v. United States*, 397 F.2d 162, 166 (10th Cir. 1968), *cert. denied*, 393 U.S. 1035 (1969); J. Wigmore *Evidence*, §18 (3d ed. 1940). By this switch in theories, the Government denied petitioner the opportunity to make a record in the trial refuting the basis for the theory advanced in the appellate court.

SUMMARY OF THE ARGUMENT

The trial court's ruling held the prosecutor's notes not to be compellable because of an asserted "work product privilege." The Ninth Circuit's ruling was "[a]part from the question whether such notes were exempt from the Jencks Act as work product (18 U.S.C. 3500) they were not statements of the defendant within the meaning of 3500(e)." The trial court looked at none of the notes in arriving at its decision. The Court of Appeals apparently looked at some. Neither the trial court nor the appellate court considered the effect of the *Brady* doctrine and whether because the notes were not produced, regardless if they were a statement or not under the Jencks Act, petitioner was denied his due process right to a fair trial under the Fifth Amendment. Due process embodies the Sixth Amendment guarantees to compulsory process and confrontation, which are particularly called into play in this case because of the unique position of the Government's chief witness, Newman, discussed *infra* at 54-57.

The Government has indicated that it will lodge with this Court the same materials which the prosecutor lodged with the Court of Appeals. If this Court determines that it will review that portion of the attorneys' notes that are lodged and thereafter determines the notes do not constitute statements within the meaning of the Jencks Act, there is still extant the question of whether the notes should have been compelled by the guarantees of the Fifth and Sixth Amendments. As Mr. Justice Frankfurter observed, "Any claim for the exclusion of evidence

logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an overriding public policy expressed in the Constitution or the law of the land."[18] There is no such justification here.

A. Disclosure of the Prosecutors' Notes was Required Under the Jencks Act.

The face of the Jencks Act (18 U.S.C. § 3500) is barren of any "work product" exception to the disclosure requirement enunciated therein. Similarly, the extensive legislative history carries no hint of any Congressional intent to so limit a criminal defendant's access to otherwise producible material. The "detailed particularity" with which Congress set forth the production requirements in the statute, combined with the extensive legislative history, noted by Mr. Justice Frankfurter in *Palermo v. United States*, 360 U.S. 343 (1959), demonstrate that Congress had no intention of creating a work product exception to production of a Government witness' prior statement.

Those federal appellate courts which have had occasion to reach this issue have uniformly rejected any assertion that a work product exception to the Jencks Act exists. Following the lead of Mr. Justice Reed in *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963), these courts have interpreted the statutory command requiring production of statements made by a witness "to an agent of the Government" as including Government attorneys within its scope.

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[18] *Nardone v. United States*, 308 U.S. 338, 340 (1939).

Furthermore, the provisions of the Jencks Act requiring the trial court to inspect and excise from the statement those matters which are irrelevant clearly serve to delimit matters contained in statements that are extraneous to the witness' testimony on direct examination. The existence of the inspection and excision requirement logically negates any inference that otherwise producible statements may be withheld in their entirety. A principal consideration behind the work product doctrine enunciated in *Hickman v. Taylor*, 329 U.S. 495 (1947), was the promotion of attorney preparation to insure the complete representation necessary to the proper functioning of the adversary system. However, the work product privilege is subject to limitations in both civil and criminal contexts. In *United States v. Nobles*, ____ U.S. ____, 95 S. Ct. 2160 (1975), while expressly reserving the question of the limits of the work product doctrine in criminal cases, this Court emphasized that the proper functioning of the adversary system requires disclosure of all facts necessary to the resolution of the issues at trial.

The Jencks Act requires that, once the defense has invoked the statute at the proper time and has demonstrated the existence of arguably compellable materials, it is the *duty* of the trial court to conduct an in camera inspection of that material and, if necessary, take extrinsic evidence necessary to the resolution of the issues of first, whether the material is a statutory statement, and, second, whether it relates to the subject matter as to which the witness has testified. *Palermo v. United States*, 360 U.S. 343, 354-55 (1959).

In the instant case, petitioner demonstrated at the beginning of cross-examination that the prosecutors had

multiple extended interviews with their chief witness, Newman, to discuss his trial testimony; that the prosecutors took notes of what Newman had told them; and that these notes were periodically read back to Newman for verification and correction. Petitioner then made a timely motion for production of the notes for an in camera inspection by the trial judge.

The refusal of the trial court to order production of the materials, inspect the documents, and take evidence concerning the circumstances under which the documents were prepared, despite timely and specific requests on the part of petitioner for both production and inspection, clearly violates the express provisions of the Jencks Act itself, as well as being at variance with the rulings of this Court. *Clancy v. United States*, 365 U.S. 312, 314-16 (1961; *Campbell v. United States* (I), 365 U.S. 85, 92-95 (1961); *Palermo v. United States*, 360 U.S. 343, 354 (1959).

Petitioner was thus foreclosed from any opportunity to build an adequate record to effectuate appellate review of this ruling, to such an extent that the very documents at issue were not even put into the record. The trial court's refusal to comply with expressly mandated procedure thus constituted a substantial abuse of discretion.

The district court's abuse of discretion here falls outside the harmless error rule enunciated in *Rosenberg v. United States*, 360 U.S. 367 (1959). In *Rosenberg*, the trial court made the withheld statement a part of the record and that decision is expressly based on the circumstance that the defense had already received from the prosecution the substantial equivalent of the statements which were erroneously withheld. In the

case at bench, there was no substantial equivalent to the material withheld and there is no real record of what was withheld; further, the withholding was extremely critical as Newman, by virtue of his deal, was under contract with the Government to give a full and complete statement prior to trial and to testify at trial *in conformity* with those pretrial statements. The documents in the prosecutor's possession went directly to the crucial areas of credibility and bias of the principal Government witness. *Davis v. Alaska*, 415 U.S. 308, 317 (1974); *Williams v. United States*, 338 F.2d 286 (D.C. Cir. 1964).

This Court can take no comfort in assuming that it is even examining the full extent of the materials withheld at trial, since at the time they were lodged in the Circuit *dehors* the record, it was over fourteen months after the event and with the prosecutor's observation that these were all he could find. Unless it is perfectly clear that the defense was not prejudiced by the failure to produce Jencks Act statements, the conviction must be reversed. *United States v. Missler*, 414 F.2d 1293, 1303-04 (4th Cir. 1969).

The refusal of the trial court to comply with the terms of the Jencks Act through inspection and disclosure to petitioner of Newman's statements constituted error. Here the Government stated in its brief to the Ninth Circuit (p. 64) that the notes "were often prepared only after lengthy conversations had occurred and a *mutual understanding* of the factual situations had been reached." Whatever else the words "mutual understanding" may mean, there can be no quarrelling with the notion that before the attorneys wrote down what Newman told them, they "correctly

understood" what he said and meant to say. If that doesn't evidence an "adoption" *and* "approval" of the statement within the definition of "statement" as contained in 18 U.S.C. § 3500(e) (1), then nothing does. Since an appellate court is not in a position to determine whether the statements could have been used effectively by petitioner, and since the failure to disclose these statements cannot be cured on appeal, the only effective remedy to petitioner is the reversal of his conviction and the granting of a new trial. *Clancy v. United States*, 365 U.S. 312 (1961); *Palmero v. United States*, 360 U.S. 343 (1959).

B. The Due Process Clause Compels Disclosure of the Prior Statements of the Prosecution's Chief Witness

At trial, petitioner's motion for production was made under the authority of not only the Jencks Act, but also under the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Under *Brady*, three separate, yet coordinate constitutional provisions are called into play: the due process clause of the Fifth Amendment, and the compulsory process and confrontation clauses of the Sixth Amendment.

Under *Brady*, prosecutorial suppression of evidence favorable to the accused on either the issue of guilt or punishment violates due process. The prosecution's failure to divulge information which would have impeached a key Government witness has been held to violate due process under the *Brady* rationale. *Giglio v. United States*, 405 U.S. 150 (1972). The fact that the material specifically requested was not made a part of

the record, nor even inspected by the trial judge, leaves room for nothing but doubt as to the possible effects of disclosure. The due process requirement is directed to evidence whose nondisclosure might have harmed the accused; and, in view of the importance of this witness to the Government, the light which this material would have shed on this witness' credibility was absolutely crucial to petitioner. Under such circumstances, the reviewing court is in the same position as was the defendant at trial – not knowing the exact contents of the material withheld because such material was missing from the record of the trial court. *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971). The effect of the trial court's acceptance of the prosecution's nonconstitutional claim of work product privilege, without inspection of the requested material, effectuated that claim of privilege solely on the basis of the prosecution's representations and without regard for the petitioner's constitutional rights. The Government cannot be permitted to undertake a criminal prosecution and then invoke a purported privilege to deprive the accused of material relevant to his defense. *United States v. Reynolds*, 345 U.S. 1 (1953). Such a practice, which inhibits the development of all relevant facts, is contrary to both the concept and the needs of the adversary system. *United States v. Nixon*, 418 U.S. 683 (1974).

The concept of due process is a general restatement of those values more specifically enunciated in various provisions of the Bill of Rights, including the compulsory process and confrontation clauses of the Sixth Amendment. The production of all relevant and admissible evidence is an essential duty of the courts to

vindicate those guarantees. *United States v. Nixon*, 418 U.S. 683 (1974).

The compulsory process clause has been recognized as a proper basis for compelling production of impeaching materials for the defense for almost 170 years. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807).

Petitioner sought the aid of the court to compel the prosecutor to produce the documents at trial. The district court's refusal to order the Government to produce these notes and thereafter for the court to make an inspection not only constituted a refusal to exercise its discretion, but also denied petitioner the opportunity to make a complete record for appellate review. Under the circumstances of this case, the judge's refusal to act resulted in a denial of the compulsory process power of the court to petitioner's detriment in violation of the commands of the Sixth Amendment. *United States v. Augenblick*, 393 U.S. 348 (1969); Westen, *The Compulsory Process Clause*, 73 *Mich. L. Rev.* 71 (1974).

Additionally, in refusing to order production of these notes, the trial court denied petitioner his right to meaningfully confront Newman and demonstrate to the jury the true extent not only of Newman's inconsistent statements, but also of his bias and vulnerability to undue pressure from the prosecutors. The object of the Sixth Amendment's confrontation clause is to enable the trier of fact to have a meaningful opportunity to evaluate the credibility of the witness by observing him under personal cross-examination. The physical presence of the witness in court is only one aspect of the right to confrontation – the other is the right to *effective*

cross-examination. *Smith v. Illinois*, 390 U.S. 129 (1968).

Effective cross-examination requires that the witness be placed in his proper setting so that the trier of fact can appraise the weight and credibility of his testimony. This does not require a showing that the cross-examination would discredit the witness; rather, prejudice inures to the defendant from the denial of the opportunity to conduct an effective cross-examination. *Alford v. United States*, 282 U.S. 687 (1931).

In the instant case, petitioner's efforts were directed to not only obtaining evidence of prior inconsistent statements, but also of material in the requested documents which would expose bias, prejudice and ulterior motives of the witness in testifying against petitioner. At trial, petitioner attempted to demonstrate that Newman's imputation of direct responsibility for all illegal acts to petitioner was the product of the witness' desire to obtain the most favorable possible treatment for himself as a co-conspirator. From the description of these documents which the Government gave to the Court of Appeals, it is abundantly clear that had the documents been produced for cross-examination, they would have enabled counsel not only to shed much unfavorable light on the reliability of Newman's narrative on direct, but also to make a record from which to argue to the jury Newman's bias. Thus, the inability of petitioner to place matters relevant to the witness' credibility before the jury constituted a denial of his right to confrontation. *Davis v. Alaska*, 415 U.S. 308 (1974).

The trial court's refusal to compel production of the prosecutors' notes in the particular facts of this case

denied petitioner the fundamental protections guaranteed him by the Fifth and Sixth Amendments. His conviction must be reversed and a new trial granted.

ARGUMENT

I.

THE TRIAL COURT'S SUA SPONTE RULING THAT THE "WORK PRODUCT" PRIVILEGE PRECLUDED DISCLOSURE OF THE PROSECUTORS' NOTES, AND ITS REFUSAL TO CONDUCT AN IN CAMERA INSPECTION, TAKE EXTRINSIC EVIDENCE, AND MAKE THE NOTES PART OF THE RECORD, IS REVERSIBLE ERROR

A. There Is No "Work Product" Exception to the Jencks Act

First, it is clear from the face of the statute that there is no express "work product" exception to the disclosure requirements of the Jencks Act. The Government is affirmatively required:

> "to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b).

There is no qualification to this command which can be said even to imply the existence of a work product exception.

Second, the legislative history of the Jencks Act cannot support the concept of a work product exception. As originally enacted, the disclosure requirements pertained to any statement made "to an agent of the Government" (Act of Sept. 2, 1957, Pub. L. No. 85-269, 71 Stat. 595, *codified as* 18 U.S.C. § 3500(a)). There is nothing in that history which so much as suggests that "an agent of the Government" necessarily excludes Government attorneys. *See* 1957 *U.S. Code Cong. & Admin. News* 1861. The 1970 amendment which deleted the words "to an agent of the Government" was neither intended to exclude attorneys from the disclosure requirement of the statute, nor to otherwise limit it. Rather, the amendment was made to expand the scope of the disclosure requirements to include grand jury minutes. *See* Act of Oct. 15, 1970, Pub. L. No. 91-452, Title I, § 102(a), 84 Stat. 922; 1970 *U.S. Code Cong. & Admin. News* 4007, 4017.

As Mr. Justice Frankfurter noted with respect to the legislative history of the Jencks Act:

> "In almost every enactment there are gaps to be filled and ambiguities to be resolved by judicial construction. This statute is not free from them. Here, however, the detailed particularity with which Congress has spoken has narrowed the scope for needful judicial interpretation to an unusual degree. The statute clearly defines procedures and plainly indicates the circumstances for their application. *Palermo v. United States*, 360 U.S. 343, 349 (1959).

Petitioner submits that this "detailed particularity," in conjunction with the not insubstantial legislative history, render it inappropriate for a court to "read into" the Jencks Act exceptions to production not clearly enunciated therein.

Third, as the Government conceded in its brief to the Ninth Circuit (p. 64), it is also clear that those

appellate courts which have had occasion to reach this question have uniformly rejected the assertion that any work product exception to the Jencks Act exists.[19]

It is significant that *Jencks v. United States*, 353 U.S. 657 (1957), the progenitor of the Jencks Act, contains no reference to a work product exception which might be construed as an internal limitation on that holding. Furthermore, *Palermo v. United States*, 360 U.S. 343 (1959), the first case in which this Court had occasion to construe the Jencks Act, contains an extended discussion of the purposes, parameters, and legislative history of the Jencks Act, yet is utterly silent on the matter of a work product exception.

Fourth, the provisions of the Jencks Act requiring the trial court to inspect the witness's statement and excise those portions which are not relevant (18 U.S.C. § 3500(c)) must necessarily be intended to replace the concept of a separate work product privilege. *See* Note, *"Work Product" in Criminal Discovery*, 1966 *Wash. U.L.Q.* 321, 328 (1966). Since the purpose of the excision requirement is to delete irrelevant materials or portions of the statement which do not substantially reflect the statements of the witness, and since an attorney's personal notations on such matters as the witness' credibility or that another witness does or does not corroborate the first witness's version are clearly not part of the witness's statement, the protection afforded by the trial court's in camera inspection clearly replaces a blanket work product privilege. The existence of the excision requirement logically negates any inference that otherwise producible statements may be withheld in their entirety. Since for the purpose of this case we must assume that the prosecutors' notes were in fact Jencks Act "statements" (for, if they were not compellable statements, there would be no logical reason for the prosecutors to have asserted work product in response to petitioner's request), it follows that the proper remedy for the Government would have been to request excision of those portions of the statement which reflect the attorneys', rather than the witness', thoughts.

Fifth, the work product doctrine enunciated in *Hickman v. Taylor*, 329 U.S. 495 (1947), to limit *pretrial discovery* in civil cases, is subject to exceptions even in the civil context. *Hickman v. Taylor* concerned a contempt proceeding arising from a refusal to comply with a discovery order in a wrongful death action. This Court characterized the use of the discovery process there as

> "an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney Forten-

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[19] *United States v. Smaldone*, 484 F.2d 311, 317 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974) ("We recognize that there is no work product exception as such"); *United States v. Hilbrich*, 341 F.2d 555, 557 (7th Cir. 1965) ("There is no 'work product' exception to the Jencks Act. If a statement taken or recorded by government counsel falls within the definition of the Act, it must be produced"); *Saunders v. United States*, 316 F.2d 346, 349 (D.C. Cir. 1963) (Per Mr. Justice Reed: "[T]he statute applies to statements made by a witness to 'an agent of the Government,' and there is nothing in the statute which necessarily excludes government attorneys from its scope"); *United States v. Aviles*, 315 F.2d 186, 191 (2d Cir. 1963) ("[The Jencks Act] makes no distinction among statements on the basis of the purpose for which they were recorded or the type of government agent to whom they were made").

> baugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice." *Id.* at 509.

This Court held that such a use of the discovery process was not contemplated by the Federal Rules of Civil Procedure and was against public policy as tending to impair the quality of legal preparation done by counsel. However, all this was stated subject to the following caveat:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents .... might be useful for purposes of impeachment or corroboration." *Id.* at 511.

This exception to the work product doctrine, imposed even in civil cases (*see Fed. R. Civ. P.* 26(b)(3)), is reflected in a multitiude of ways in the criminal context. Thus, Rule 16 of the Federal Rules of Criminal Procedure, the Jencks Act, and the doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), all reflect facets of an altogether different standard imposed in criminal cases. *See Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts*, 62 F.R.D. 271, 309-14 (1974); Note, *"Work Product" in Criminal Discovery*, 1966 *Wash. U.L.Q.* at 334-44.

This Court recently had occasion to discuss the application of the work product doctrine in criminal cases in *United States v. Nobles*, ____ U.S. ____, 95 S.Ct. 2160 (1975). Writing for the majority, Mr. Justice Powell noted that the work product doctrine's "role in assuring the proper functioning of the criminal justice system is even more vital" than in the civil litigation context. *Id.* at 2170. However, this Court found that "the privilege derived from the work-product doctrine is not absolute [but] like other qualified privileges it may be waived." *Id.* This Court thus approved the trial judge's requiring production for the Government's inspection of a defense investigator's contemporaneously recorded interview reports which "preserved the essence" of the investigator's pretrial conversations with two prosecution witnesses, as a precondition to allowing the investigator to testify in rebuttal. While the opinion expressly reserved the question of the limits of the work product doctrine in criminal cases, the policy comments are pertinent here.

> "[The District Court] merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id.* at 2171.

In the context of the case at bench, the application of *Nobles* is clear. *Nobles* found a duty to disclose at the time of trial the contents of what this Court

recognized as work product, despite the Sixth Amendment issue (absent here), in the absence of an express statutory policy requiring disclosure (in the instant case, the Jencks Act), and without expressly requiring the formal safeguards inherent in the Jencks Act definition of a "statement" (18 U.S.C. § 3500(e)).

Under these circumstances, Mr. Justice Reed's observation twelve years ago remains persuasive:

> "It may be true that the work product rule reflects considerations other than maintaining the privacy of an attorney's thoughts and trial tactics. [Citation omitted.] However, we find no rationale for withholding a witness' statement in the prosecutor's hands which satisfies the Jencks Act requirements, which is sufficient to overcome the Jencks decision and statute." *Saunders v. United States*, 316 F.2d 346, 350 n.3 (D.C. Cir. 1963).

In light of the considerations and authorities set forth above, it is clear that this case is appropriate for the exercise of

> "the federal judiciary's inherent power to require the prosecution to produce previously recorded statements of its witnesses so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced." *United States v. Nobles*, 95 S.Ct. at 2166.

Petitioner therefore submits that there exists no work product doctrine applicable to bar production of a Government witness' prior statements in the face of a defense Jencks Act demand, and the trial court's holding to the contrary was therefore plain error.

B. The District Court Erroneously Denied Petitioner's Request For An In Camera Inspection Of The Prosecutor's Notes

The command of the Jencks Act is unambiguous. After a Government witness has testified on direct examination,

> "the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. . . .
>
> "If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. . . ." 18 U.S.C. § § 3500(b), (c).

In order to compel production of statements in the prosecution's possession, "the burden rests on the defendant to invoke the statute at the appropriate time." *Ogden v. United States*, 303 F.2d 724, 733 (9th Cir. 1962). However, "[r]elevancy and materiality for the purpose of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness." *Jencks v. United States*, 353 U.S. at 669. At trial, petitioner established that Newman had multiple extended interviews with the Government attorneys to discuss his trial testimony; that the Government attorneys took notes of what the witness told them; and that these notes were periodically read back to the witness for verification and correction. Petitioner then

made a timely motion for production of the notes for in camera inspection by the trial judge and a sufficient showing of relevancy and materiality to compel production.

This Court has made it clear that to meet the requirements of § 3500(e) (1), the "statement" need not have been signed by the witness, nor written by him, nor even be a substantially verbatim recording of a prior oral statement. *Campbell v. United States* (II), 373 U.S. 487, 492 n.6 (1963). "[T]he witness may adopt or ratify an interview report in a piecemeal manner by response to a number of inquiries as effectually as by a single generalized response." *United States v. Scaglione*, 446 F.2d 182, 184 (5th Cir. 1971), *cert. denied*, 404 U.S. 941 (1971). Here Newman admitted that the notes were read back to him and that he would either correct or confirm the prosecutors' record of what was said, thus insuring that the summary did not materially vary from the witness' account. Thus, petitioner made a sufficient showing to compel production to at least the trial court for its inspection.[20] *See Palermo v. United States*, 360 U.S. at 350; *United States v. Chitwood*, 457 F.2d 676, 678 (6th Cir. 1972), *cert. denied*, 409 U.S. 858 (1972).

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[20]Newman's equivocation on cross-examination as to the extent to which the notes were read back to him may properly be laid to his self-interest in not associating himself too closely with potentially impeaching prior statements. As this Court noted in *Campbell v. United States* (I), 365 U.S. 85, 98 (1961), it is improper for a defendant to be "deprived of the opportunity to make use of the report by the obviously self-serving declarations of the witness that it did not accurately record what he told the agent."

It cannot be said that a defendant must establish an air tight case that particular documents are Jencks Act statements merely to gain an in camera examination by the trial court, "because the defendant often does not and cannot know whether any such statement exists." *Saunders v. United States*, 316 F.2d at 349. "The Court and the defendant must grope; only the government knows the content of its own files." *Ogden v. United States*, 303 F.2d at 733. Moreover,

> "the statute does not vest in the Government the unilateral power to determine without judicial supervision a controverted question between the parties concerning whether a document in the possession of the Government constitutes a statement within the purview of the statute. . . ." *Bary v. United States*, 292 F.2d 53, 58 (10th Cir. 1961).

Under the circumstances of the case at bench, it is evident that this foundation and petitioner's subsequent motions for production

> "impose[d] on the trial judge an affirmative duty to conduct a non-adversary hearing, out of the presence of the jury, to ascertain whether documents in the possession of the Government [were] Jencks Act statements." *United States v. Chitwood*, 457 F.2d at 678.

See Campbell v. United States (I), 365 U.S. 85, 95 (1961); *Saunders v. United States*, 316 F.2d at 349; *Ogden v. United States*, 303 F.2d at 733.

This Court first approved the in camera inspection of the contested documents by the trial court in *Palermo v. United States*, 360 U.S. 343 (1959).[21] In conjunction

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[21]"[W]hen it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the

with the in camera inspection, "[a]n affirmative duty is placed upon the trial court to secure the information which is necessary to a proper ruling on particular requests for production in light of the statutory purposes. . . ." *Ogden v. United States*, 303 F.2d at 733.

The cases noted *supra* have thus recognized the need for two separate but related actions:

(i) Submission of the statements for inspection by the trial court; and

(ii) The taking of evidence concerning the circumstances under which the statement was prepared.

Despite the three requests on the part of petitioner for production, as well as the specific requests for an in camera examination of the notes by the trial judge, no production was ever made by the prosecution nor was any inspection performed by the court. Such an omission was clearly contrary to the express provisions of the Jencks Act itself (18 U.S.C. § § 3500(b), (c)), as well as being at variance with the rulings of this Court. *Clancy v. United States*, 365 U.S. at 92-95; *Palermo v. United States*, 360 U.S. at 354.

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statement to the trial judge for an in camera determination. Indeed, any other procedure would be destructive of the statutory purpose. . . .

"It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. . . ." 360 U.S. at 354-55.

Accord, Campbell v. United States (I), 365 U.S. 85, 92-96 (1961).

The net result of the trial court's error was to foreclose any opportunity for petitioner to build an adequate record to effectuate appellate review of this decision. With the exception of those few details which counsel was able to elicit from Newman on cross-examination, the record is virtually barren of credible evidence as to the exact nature and contents of the notes. The fact that the Government subsequently tendered *some* notes to the Court of Appeals does not remedy matters, for the issue of the completeness of those notes aside, petitioner submits that a

> "[d]etermination of the question whether the Government should be ordered to produce government papers could not be made from a mere inspection of the [documents], but only with the help of extrinsic evidence." *Campbell v. United States* (I), 365 U.S. at 92-93.

Furthermore, petitioner is unable to understand how an appellate court can be expected to review the ruling of a trial court for abuse of discretion when the appellate court is presumably the first tribunal to have before it *some* of the very material which was essential to the exercise of that discretion, and the trial court has made no findings of fact because it has taken no evidence.

For the reasons detailed above, the trial judge's failure to conduct an in camera examination of the notes here at issue constitutes reversible error *per se*. *Campbell v. United States* (I), 365 U.S. at 92-93; *Palermo v. United States*, 360 U.S. at 354.

C. The Failure of the Trial Court To Examine and Disclose to the Defense the Witness' Statements Was Prejudicial Error Requiring a New Trial.

The application of the harmless error doctrine in connection with the failure to produce Jencks Act statements was first discussed by this Court in *Rosenberg v. United States*, 360 U.S. 367 (1959), where the error of the trial court in not making a producible statement available was held to be harmless. The statement there in question was a letter written prior to trial by the witness to the Assistant U.S. Attorney, stating that her memory of the events was fading and that she required the opportunity to refresh it by rereading the text of her original statement to the FBI.[22] The sole subject in the statement in *Rosenberg*, therefore, was the fact of loss of recollection. The Court stated:

> "[T]he same information which was contained in the letter was revealed to defendant's counsel by statements made by [the witness] under cross-examination and upon questioning by the trial judge." *Id.* at 370.

The case at bench, however, far more closely resembles the situation with which the Court was confronted in *Williams v. United States*, 338 F.2d 286 (D.C. Cir. 1964). In *Williams*, as in the instant case, the critical issue for the defense was the credibility of the principal prosecution witnesses who told stories which

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[22]The letter was made a part of the record by the trial judge and thus available for effective appellate review.

sharply conflicted with that told by the defendant. The court reasoned:

> "The issue of credibility of the witnesses for the defense vis-a-vis those for the prosecution was important. Defendant took the stand and gave quite a different version from that given by Butler and Smith of the events which led to his indictment. . . . If believed this version of the affair might have persuaded the jury that Butler . . . was not to be believed, and that the facts did not require conviction of defendant. We do not intimate that the jury would have so concluded. If there were discrepancies between the statements and the testimony of Butler and Smith given at the trial, as we find to be the case, then the failure to make the statements available to defense counsel deprived him of the right effectively to conduct the defense as contemplated by the Jencks rule. . . .
>
> "The issue is whether counsel should have had the choice of using the statements to test the witness' credibility; that is, in the present context, to test whether the witnesses gave true accounts of what occurred." *Id.* at 290 (footnote omitted).

The Court concluded that under these circumstances the error in denying the request of the defense for production of the statements could not be harmless.

The testimony of Newman at trial far exceeded in both detail and scope the sworn statement taken on May 11, 1973. (*See* pp. 15-18, *supra*.) There was no substantial equivalent to Newman's statements to the prosecutors, as there was in *Rosenberg*. Furthermore, as in *Williams*, the credibility of Newman as the principal Government witness was the key to the prosecution's case, and Newman was subject to prosecutorial

pressures, since he was seeking to render all assistance possible to curry the Government's favor. *Cf. Davis v. Alaska*, 415 U.S. 308, 320 (1973). In such circumstances, the argument that no prejudice inured to the defendant through the nonproduction of the statements can only be based on a series of assumptions regarding the potential effectiveness of cross-examination which neither the prosecution nor the court is qualified to make.[23]

Whether or not the prosecutor's notes were appropriate for use for impeachment is not a question whose resolution rests unilaterally with the Government. *Bary v. United States*, 292 F.2d at 58. Similarly, it is not for the courts, especially the appellate courts, to look at a cold record and speculate whether these statements could have been used effectively. *Clancy v. United States*, 365 U.S. at 316. "[W]hether the statements may be useful for purposes of impeachment is a decision which rests, of course, with the defendant himself." *Scales v. United States*, 367 U.S. 203, 258 (1961). One court has held that because the Jencks Act is designed to insure for a defendant the constitutional guarantee of effective confrontation of Government witnesses:

> "Violations of the statute are necessarily attended by the danger that this precious right will be impaired. For this reason, and also because it is ordinarily difficult upon review of a cold record to ascertain the value to the defense of a statement withheld, violation of the Act is excused only in extraordinary circumstances. [Citations omitted.] *Unless it is perfectly clear that the defense was not prejudiced by the omission, reversal is indicated.*" *United States v. Missler*, 414 F.2d 1293, 1303-04 (4th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) (emphasis added).

Accord, United States v. Cleveland (I), 477 F.2d 310, 316 n.9 (7th Cir. 1973); *United States v. Aaron*, 457 F.2d 865, 869 (2d Cir. 1972).

The current application of the *Rosenberg* "harmless error" rule puts defense counsel in the anomalous position of attempting to argue on appeal that the denial of the right to inspect the producible statements in issue at trial was prejudicial, without having allowed counsel to make an informed preparation of his argument by reference to those documents. As a result, the shoe is on the wrong foot. As suggested in *Missler, Aaron,* and *Cleveland* (I), *supra*, the burden should rest on the Government to show that the defense was not prejudiced by the omission, and unless that burden is met, the judgment should be reversed and a new trial ordered. These considerations are discussed at length in both *Erckman v. United States*, 416 U.S. 909 (1974) (Marshall & Brennan, J.J., dissenting from denial of certiorari), and *Rosenberg v. United States*, 360 U.S. at 373-77 (1959) (Brennan, J., dissenting).

The contention by the Government in the Circuit court to the effect that the error in refusing to produce the statements was harmless because the statements were inadmissible as evidence is clearly incorrect. The admissibility of the statements is not properly an

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[23]This Court recognized almost twenty years ago that direct contradiction was not the only test of inconsistency, but that omissions, changes in emphasis, and rearrangement of the order of treatment may also contribute to a test of credibility on cross-examination. *Jencks v. United States,* 353 U.S. at 667.

issue,[24] for "the producibility of statements under the Jencks Act and their admissibility under the rules of evidence are separate questions." *Campbell v. United States* (II), 373 U.S. at 493 n.7.

The Government also raised the contention in the Ninth Circuit that because petitioner's cross-examination of Newman was "more than sufficient," and "those statements given by Newman under oath" (the May 11, 1973, transcript) and "to investigative agents" (a Postal Inspector's Report made many years prior) were disclosed, therefore the claim of prejudice is without merit. Appellee's Ninth Circuit Brief at 67. In support of this contention the Government cited *Rosenberg, United States v. Smaldone*, 484 F.2d 311, 318 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974), and *Government of the Virgin Islands v. Lovell*, 410 F.2d 307, 310-11 (3d Cir. 1969), *cert. denied*, 396 U.S. 964 (1969).

As has been noted above, *Rosenberg* set forth the "harmless error" rule in Jencks Act cases where the defense already possessed "the very same information" (360 U.S. at 371) and the prior statement had the potential to impeach on only one subject. However, the case at bench

> "is not a case in which the statement erroneously withheld from the defense merely duplicated information already in the defense's possession; it

[24] As Mr. Justice Frankfurter noted:

> "Of course the statute does not provide that inconsistency between the statement and the witness' testimony is to be a relevant consideration. Neither is it significant whether or not the statement is admissible as evidence." *Palermo v. United States*, 360 U.S. at 353 n.10.

> is not a case in which the witness' testimony was unimportant to the proofs necessary for conviction; and it is not a case in which the witness' statement was wholly void of possible use for impeachment." *Id.* at 376-77 (Brennan, J. dissenting).

Lovell also found the erroneous failure to disclose to be harmless error in a situation where preliminary hearing testimony and a signed, inconsistent statement to defense counsel's own law clerk were both available to the defense and revealed the same information as was withheld. 410 F.2d at 310-11. While both *Rosenberg* and *Lovell* offer only inferential support to the Government's position, *Smaldone* can be viscerally construed as saying that extensive cross-examination is an adequate substitute. However, a careful reading of *Smaldone* reveals that the thrust of the opinion was that the notes involved therein were not statutory "statements" at all, and petitioner submits the discussion of harmless error was only a make-weight. Even at that, the principal emphasis in the discussion of harmless error is the fact that the defense had already received several detailed prior statements of the witnesses, including a probation report which did not fall under the Jencks Act, and the notes in question covered but a single two-hour conversation. 484 F.2d at 316-18.

Furthermore, taken as the Government urged below, *Smaldone* enunciates a most dangerous concept, *viz.*: that extensive cross-examination of a witness can cure otherwise reversible errors in a criminal trial. What the Government has argued boils down to the position that, by conducting a searching cross-examination of a

Government witness, the defendant in effect waives[25] the right to challenge what would otherwise be prejudicial error on the part of the prosecutor or court. But that waiver argument is no more than sheer sophistry, which flies in the very teeth of the Sixth Amendment's confrontation clause. *See* discussion at pp. 69-72, *infra*. Yet the Government's interpretation of *Smaldone* would restrict the exercise of the right of cross-examination by throwing a criminal defendant into the "Hobson's Choice" of having to choose between the alternatives of attempting to vigorously cross-examine the key witness with the information available, knowing that the Government has failed to produce all of the materials which it is obligated to produce; or, abandoning the cross-examination on the basis of a speculative appraisal of what an appellate court may do as a result of the failure of the Government to comply with the commands of the statute. As this Court noted nearly forty-five years ago:

> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them." *Alford v. United States*, 282 U.S. 687, 692 (1931).

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[25]"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). As this Court said in the context of another Sixth Amendment right in *Carnley v. Cochran*, 369 U.S. 506, 516 (1962):

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

Accord, Smith v. Illinois, 390 U.S. 129, 132 (1968). Such a choice cannot be forced upon a criminal defendant by a court which "has been zealous to protect these rights from erosion." *Greene v. McElroy*, 360 U.S. 474, 497 (1959).

Petitioner thus submits that it is "clearly incompatible with our standards for the administration of criminal justice in the federal courts" (*Jencks v. United States*, 353 U.S. at 668) to condition the effective enforcement of the statutory right guaranteed a criminal defendant under the Jencks Act on the ineffectiveness of the exercise of his right of cross-examination under the Sixth Amendment.

For the reasons enunciated above, the refusal of the trial court to comply with the terms of the Jencks Act and turn over the statements of the witness Newman to petitioner constituted error. As this Court stated in finding prejudicial error requiring a new trial in *Clancy v. United States*, 365 U.S. at 316:

> "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively."

Because the failure to turn over these statements cannot be cured on appeal, it follows that the only remedy available to petitioner is the reversal of his conviction and the granting of a new trial.

II.

THE TRIAL COURT'S REFUSAL TO COMPEL DISCLOSURE OF MATERIAL RELEVANT TO THE PROSECUTION'S CHIEF WITNESS VIOLATED PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS.

The Jencks Act aside, there are three constitutional bases upon which the notes should have been examined by the trial court and produced for petitioner: the due process clause of the Fifth Amendment; the compulsory process and the confrontation clauses of the Sixth Amendment.[26] They are uniquely called into play in the case at bench because:

(i) Newman was the key Government witness and, pursuant to his plea agreement, required to give a

[26]While neither the compulsory process nor confrontation clause was explicitly urged by petitioner as grounds for production of the notes in the courts below, these are subsumed within the claims for the notes under the due process grounds of *Brady*. *United States v. Nixon*, 418 U.S. 683, 711-13 (1974). "[I]dentical grounds may often be supported by different legal arguments, or be couched in different language, or vary in immaterial respects. Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Saunders v. United States*, 373 U.S. 1, 16 (1963) (citations omitted). Whether the issue here is viewed as a due process issue or a compulsory process or confrontation issue (and different courts have viewed the matter differently), the relief sought is and was in the courts below precisely the same. Further, under *Fed. R. Crim. P.* 52(b), appellate courts have the authority to consider "plain errors affecting substantial rights," especially those of constitutional dimension, even though not pressed in the court below. *Alexander v. United States*, 390 F.2d 101, 103 n.3 (5th Cir. 1968). *See Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941); *accord, Curtis Publ. Co. v. Butts*, 388 U.S. 130, 145 (1967).

complete statement concerning his knowledge and involvement in the circumstances surrounding the indictment; (Ap. 48)

(ii) Newman was likewise required by that agreement to *testify* at trial *in conformity* with the *complete statement* which he gave; (Ap. 48)

(iii) The complete statement was necessarily comprised of two parts, *viz.*, the May 11 reported statement; and those notes of the prosecutors prepared during those 40 hours of meetings which preceded Newman's direct testimony and which "were often prepared only after lengthy conversations had occurred and a *mutual understanding of the factual situation had been reached.*" (Government's brief to the Circuit, p. 64)

(iv) At the same time petitioner was seeking to obtain the prosecutors' notes of what Newman told them, petitioner was also seeking to determine the full extent of Newman's bargain and whether it was other than Newman testified and as portrayed in the agreement, *viz.*, that he would be pleading to one count of the outstanding indictment.[27]

[27]Newman at trial denied that he would be permitted to plead to other than a felony count of the indictment. (Ap. 82, 95) As part and parcel of the motion to examine the attorneys' notes, on the authority of *Brady* and *Giglio*, petitioner also sought to have the prosecutors disclose whether there were any conversations or side agreements with Newman. (Ap. 55-56) The court did *not* order the Government to respond. (Ap. 99) The motions were denied; the Government produced nothing. (Ap. 98-100) The prosecutor in final argument told the jury that Newman had no option to plead to a misdemeanor, that there was no deal with Newman to let him plead to a misdemeanor, and that any suggestion by petitioner's counsel to the contrary was his

(v) Although Newman's statements were supposed to be sworn to and "on the record," the Government took the precaution of insuring that these meetings (at least five subsequent to the May 11th meeting) would be "off the record", and that they would thus not result in sworn statements which clearly could be used by the defense for impeachment. The Government obviously was seeking to protect whatever Newman told them or whatever they told him which resulted in their arriving at "mutual understandings" from discovery by petitioner.[28]

The Government's portrayal of Newman before the jury was one of a contrite, remorseful man who had confessed all, now had nothing to hide and was willing to take his punishment by pleading guilty to one of the fourteen counts in the indictment. The thrust of Newman's testimony was to cast himself as an individual without free will who, while with FSL was under the total domination and control of petitioner.

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imagination. (R.T. 0259) Nonetheless, ten weeks after petitioner was sentenced, the indictment against Newman was dismissed. (Ap. 32) And, in fact, Newman was allowed to plead guilty to two misdemeanor tax violations and placed on probation. (C.T. 546, 579-80)

[28]In a separate but related effort to protect Newman from impeaching sources, the prosecutor engaged in a maneuver which the trial court found to be "highly improper." (R.T. L296) After Newman signed his "agreement," the prosecutor threatened that if a defense witness, Mr. Schwartz, testified, there was a significant possibility that he would be indicted. (R.T. L259-60) Schwartz, a lawyer for FSL, had dealt extensively with Newman, and was the only other person besides petitioner in a position to refute Newman's testimony. Schwartz initially refused to testify (R.T. L291), until at the direction of the court he was granted immunity. (R.T. L296-97)

In the process of his testimony on direct examination–indeed, on cross, redirect and rebuttal–Newman directly attributed, explained and tied in all of the claimed illegalities of FSL's operations and responsibilities for matters alleged in the indictment directly to petitioner, thus shifting the responsibility for the illegal activities from his shoulders to those of petitioner.[29]

Under these circumstances there is no denying that the Government had its key witness in a truss. The value of any variances between what Newman said to the prosecutors and what he said on the witness stand was of paramount concern to petitioner and were matters which petitioner had an absolute right to bring to the attention of the jury. Further, had petitioner known the full extent of what Newman was doing for the Government (as explained in Appellee's Ninth Circuit Brief at 63-65 and footnote 29, *supra*), it would have materially assisted petitioner in demonstrating Newman's bias and vulnerability to undue pressure from the Government.

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[29]In its brief to the Ninth Circuit, the Government explained Newman's role, in addition to his testimony, during those 40 hours of "unreported" conferences as follows:

> "Newman, in fact, did far more than answer questions. He helped the government attorneys in drafting questions to be asked of him and of other witnesses. He helped suggest certain areas of cross-examination to be covered in the event that Goldberg ultimately testified. He explained or made sense out of an almost endless number of letters, documents and other pieces of physical evidence. In many respects, Newman effectively educated the prosecution in the short time available as to the significance of the every day operations of FSL, as well as providing invaluable insight into the personality and past history of Philip Goldberg." (Appellee's Ninth Circuit Brief at 63-64).

A. The Due Process Clause Requires Production of Impeaching Documents and Materials in the Prosecutors' Possession.

In the trial court, petitioner specifically grounded his request for these notes upon the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, *Giles v. Maryland*, 386 U.S. 66 (1967), and *Giglio v. United States*, 405 U.S. 150 (1972).

In *Brady*, this Court held:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor." 373 U.S. at 87.

This Court stated the unfairness–and hence the violation of due process–inherent in the suppression of exculpatory evidence stems from the prosecutor's role in helping to "shape a trial that bears heavily on the defendant" (*id.* at 88); and stressed both the affirmative duty of the prosecutor to insure that criminal trials are fair and harm caused to defendants when prosecutors fail to meet this obligation. In *Giles v. Maryland*, 386 U.S. at 98, Mr. Justice Fortas, concurring, observed that:

> "No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses."

Justice Fortas pointed out that while not all information, if withheld, created prejudicial error, in *Giles*, petitioners had sought "information [which] was

specific, factual and concrete, although its implications may be highly debatable," and that the information withheld went directly to petitioners' defense. *Id.* at 98-99. He found that the error there could not be harmless.

Subsequently, in *Giglio v. United States*, this Court held that a defendant's right to due process under the *Brady* rationale was violated where events which would have impeached a key Government witness were not disclosed to the defense, stating:

> "When the 'reliability of a given witness may well be determinative of guilt or innocence' nondisclosure of evidence affecting credibility falls within this general rule." 405 U.S. at 154.

In *Giglio*, the Court observed that the witness, Taliento, was the key witness, and that "Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know it." *Id.* at 154-55.

Similarly, then-Circuit Justice Thurgood Marshall's insightful analysis of *Brady* in *United States v. Wilkins*, 326 F.2d 135 (2d Cir. 1964), revealed a duty on the part of the prosecution to make disclosure of exculpatory evidence even in the absence of a defense request, "as an ingredient of due process." *Id.* at 137-38. Holding that non-disclosure of the existence of witnesses who would have testified that the defendant was not the person involved in the charged robbery was grounds for granting habeas corpus relief, Justice Marshall said:

> "We cannot speculate as to the effect this testimony would have had on the jury if it had an

opportunity to hear it. The jury was denied that opportunity by virtue of the prosecution's failure to acquaint defense counsel and the trial judge with the names of the witnesses. In the circumstances of this case, that denial was inconsistent with proper standards of fairness, and constituted the judgement of conviction a denial of due process of law." *Id.* at 140.

An analogous problem to that with which petitioner is faced in the case at bench was discussed by the District of Columbia Circuit in *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971). The issue there was whether recordings of conversations between the appellant and undercover agents, allegedly concerning narcotics, were sufficiently vital to the defense for their nonproduction at trial to create prejudicial error. The alleged "loss" of the tapes by the Government in *Bryant* put the reviewing court in the same position as petitioner is in here—not knowing what the exact contents of the material were because the record from the trial court was missing the material relevant to a decision.

> "There is not simply 'substantial room for doubt,' but room for nothing except doubt as to the effect of disclosure. What we do know is that the conversations recorded on the tape were absolutely crucial to the question of appellants' guilt or innocence. That fact, coupled with the unavoidable possibility that the tape might have been significantly 'favorable' to the accused, is enough to bring these cases within the constitutional concern. If the due process requirement is directed to evidence whose non-disclosure 'might' have harmed the accused, its purpose clearly reaches the type of missing evidence at issue here. Were *Brady* and its progeny applicable only when

> the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal. The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government." *Id.* at 648.

Certainly any materials which would have permitted petitioner to show that Newman was making statements to the prosecutors inconsistent with his trial testimony, or giving a different emphasis to the same facts would have been relevant to the cross-examining process for testing Newman's credibility. As this Court said in *Jencks v. United States*, 353 U.S. at 667:

> "Flat contradictions between the witness's testimony and the version of events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness's trial testimony."

The logical conclusion to be drawn from these considerations is that reached by the trial court in the habeas corpus case of *Coleman v. Maxwell*, 273 F. Supp. 275 (S.D. Ohio 1967). Although the court found the error in withholding the evidence at issue to have been harmless, it admonished prosecutors that:

> "In view of the fact that the due process clause is violated by both guileful and guileless suppres-

> sion, what is required is an enlightened approach by prosecutors to turn over, on request, statements of witnesses who have testified on behalf of the prosecution which are relative to the subject matter of such testimony. . . ." *Id.* at 280-81.

The need for this "enlightened approach" is demonstrated by the existence of an interface between the constitutional safeguards of the due process clause and the various statutory provisions dealing with pretrial (*Fed. R. Crim. P.* 16) and at-trial (Jencks Act) disclosure of certain material.

While the *Jencks* decision rested on nonconstitutional grounds (the supervisory power of the Supreme Court over the federal judiciary), "it would be idle to say that the commands of the constitution were not close to the surface of this decision." *Palermo v. United States*, 360 U.S. at 362-63 (Brennan, J., concurring). It was therefore inevitable that the due process foundation for the line of cases dealing with suppression of evidence,[30] which found full flower in *Brady v. Maryland* should be explicitly related to the Jencks Act series of cases. Thus, in *United States v. Wright*, 489 F.2d 1181, 1192 (D.C. Cir. 1973), it was observed:

> "The due process clause of the constitution imposes an affirmative duty on the government to reveal evidence helpful to the defense. *Brady v. Maryland* [citation omitted]. The Jencks Act is only one aspect of this duty. *See Jencks v. U.S.* [citation omitted]."

It has also been suggested that where the Jencks Act denies access to information that must be disclosed

[30] *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959).

under the *Brady* rule, the Jencks Act must stand aside. Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 *U. Chi. L. Rev.* 112, 119-20 (1972). When the limitations on disclosure in the Jencks Act, which are designed to promote nonconstitutional values relating to the functioning of the adversary system in criminal trials, infringe upon the effectuation of rights of constitutional dimension guaranteed a criminal defendant under *Brady v. Maryland*, due process requires that the nonconstitutional purposes give way to the vindication of the constitutional rights. The due process clause requires that the Government seek to bring about the nonconstitutional ends in a manner that will be the "least restrictive" of or "least intrusive" on the defendant's exercise of constitutional rights at trial. *Cf.* Ratner, *The Function of the Due Process Clause*, 116 *U. Pa. L. Rev.* 1048, 1063-68 (1968). Thus, the interposition of a work product objection, which has no constitutional basis, let alone a statutory basis, is similarly ineffective to bar production of material which must be disclosed under *Brady*. *Cf. Dennis v. United States*, 384 U.S. 855, 873 (1966): "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecutor to have exclusive access to a storehouse of relevant facts."

The Government not only "prosecutes an accused, [but] also has the duty to see that justice is done." *United States v. Reynolds*, 345 U.S. 1, 12 (1953). Therefore, ". . . it [would be] unconscionable to allow it to undertake prosecution and then invoke its . . . privileges to deprive the accused of anything which might be material to his defense . . ." *Id.*

At the core of this case is the proposition recently enunciated by this Court that "[t]he need to develop

all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. at 709. Petitioner therefore submits that in those instances where materials are in the hands of the prosecutors, which are not technically statements within the meaning of 18 U.S.C. §3500(e), but nonetheless are favorable to the defense in that they will assist in the impeachment of a major Government witness, upon timely demand these materials must be disclosed. *Brady v. Maryland, supra; Giglio v. United States, supra. Cf. Flores v. Craven*, 503 F.2d 1030, 1031 (9th Cir. 1974); *United States v. Ahmad*, 53 F.R.D. 186, 193 (M.D. Pa. 1971). *See also Levin v. Clark*, 408 F.2d 1209, 1210-12 (D.C. Cir. 1967).

B. The Compulsory Process and Confrontation Clauses Require Production of Impeaching Materials in the Prosecutors' Possession Upon Timely Demand.

The disclosure of material which will assist in impeaching a Government witness's testimony after timely demand has been made by a defendant is a right which flows not only from the due process clause but also the compulsory process and confrontation clauses of the Sixth Amendment.[31]

[31] Mr. Justice Black, concurring in *Williams v. Florida*, 399 U.S. 78, 112-13 (1970), stated:

> "[W]hen a question concerning the constitutionality of some aspect of criminal procedure arises, this Court must consider all those provisions and interpret them together. The Fifth Amendment . . . is not an isolated, distinct provision. It is part of a system of constitutionally required procedures, and its true meaning can be seen only in light of all those provisions. 'Strict construction' of the words of the Constitution does not mean that the Court can look only to one phrase, clause, or sentence in the Constitution and expect to find the right answer. Each provision has a clear and definite meaning, and various provisions considered together may have an equally clear and definite meaning."

The commands of the Sixth Amendment's requirements of confrontation and compulsory process are fundamental to our traditions of due process, as this Court held in *Washington v. Texas*, 388 U.S. 14, 19 (1967), wherein it invalidated a Texas statute that prohibited an accomplice from testifying on behalf of a co-defendant.

Just last year in *United States v. Nixon*, 418 U.S. 683 (1974), this Court observed the interface between these three separate but related commands. In overriding the President's generalized claim of executive privilege and ordering disclosure *prior to trial*, this Court found that the tapes could be relevant at trial, *inter alia*, for the purpose of impeaching the credibility of "any other co-conspirator" who testified. *Id.* at 701. The tapes were ordered produced because:

> "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.
>
> * * *

"The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.

* * *

"... [T[he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts...." *Id.* at 709, 711-12.

1. The Compulsory Process Clause Requires the Prosecution To Produce Possible Impeachment Materials Upon Timely Demand by a Defendant.

In 1969, this Court suggested that "in some situations denial of the production of a Jencks Act statement might be a denial of a Sixth Amendment right. There is, for example, the command of the Sixth Amendment that criminal defendants have compulsory process to obtain witnesses for their defense." *United States v. Augenblick*, 393 U.S. 348, 356 (1969).

Long-standing precedent for reliance on the compulsory process to compel production of impeaching materials for the defense can be found in Chief Justice Marshall's opinions sitting as a circuit court justice in

United States v. Burr, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807); *United States v. Burr*, 25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807).

> "The court's discretionary power to compel production of a document in the custody of a government agency must be exercised in the light of the requirement of the [compulsory process clause of the] Sixth Amendment.... This constitutional mandate extends to documentary as well as oral evidence. [Citations omitted]." *United States v. Schneiderman*, 106 F. Supp. 731, 735 (S.D. Cal. 1952); cited with approval in *Jencks v. United States*, 353 U.S. at 668 n.13 (1957).

Similarly, in *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974), the court stated that "[t]he prosecution's constitutional duty to disclose exculpatory material statements of witnesses on the defendant's request [citations omitted] is clearly within the sphere of influence of the Sixth Amendment's compulsory process guarantee."

Here petitioner sought the aid of the court through appropriate and timely motions during the course of the trial, but the trial court refused to order the notes produced for the court's inspection, let alone to take so much as a peek at the notes which petitioner sought to fully effectuate his rights of cross-examination of Newman.

> "In so far as the defendant seeks impeaching evidence by means other than examining prosecution witnesses, he seeks to produce evidence in his favor. Therefore, in so far as he wishes to impeach them by producing their prior statements or by subpoenaing independent witnesses, he must rely on compulsory process." Westen, *The Compulsory Process Clause*, 73 *Mich. L. Rev.* 71, 126 (1974) (footnotes omitted).

Petitioner's motions, made on three separate occasions, were appropriately limited and specifically designated the materials which petitioner sought to have produced. In each instance he sought to have the court at the very least examine the notes; each request for examination was rejected by the court, and petitioner was in fact denied the compulsory process guaranteed him by the Fifth Amendment. Petitioner made as strong a showing as he was able under the circumstances, *viz.*, that the notes were taken by the prosecutors during their various interviews with Newman; that occasionally the notes were read back to Newman; and that Newman corrected the notes which were read back to him. While petitioner recognizes that a trial court has a certain amount of discretion in ordering or not ordering the production of requested materials, the trial court is limited in the exercise of its discretion to order production only by the traditional doctrines of relevancy and materiality. *See Gordon v. United States*, 344 U.S. 414, 420 (1953). Relevancy and materiality for cross-examination purposes are established when "the reports are shown to relate to the testimony of the witness." *Jencks v. United States*, 353 U.S. at 669. Here the trial judge in failing even to make an inspection of the notes not only flatly refused to exercise his discretion, as was his duty, but also denied petitioner the right to make a complete record by ordering production of the notes so that they could at least become part of the record. Thus, petitioner suffered a total denial of his Sixth Amendment right to compulsory process, and his conviction must be reversed.

2. Effectuation of Petitioner's Right to Meaningful Confrontation of the Witness Newman Required Production of Possibly Impeaching Materials.

The primary object of the Sixth Amendment's confrontation clause is a personal cross-examination of the witness before the jury so that "the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his . . . testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). This Court has consistently held the right of confrontation to be a fundamental right of a criminal defendant. *Kirby v. United States*, 174 U.S. 47, 55-56 (1899); *Alford v. United States*, 282 U.S. 687, 692 (1931); *In re Oliver*, 333 U.S. 257, 273 (1948); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959); *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965); *Pointer v. Texas*, 380 U.S. 400, 405 (1965); *Smith v. Illinois*, 390 U.S. 129, 131-32 (1968); *Barber v. Page*, 390 U.S. 719, 725 (1968); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). These cases recognize that the witness's presence in court is only one side of the confrontation coin—the other is the right to *effective* cross-examination.

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.* . . . To say that prejudice can be established

> only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . ." *Alford v. United States*, 282 U.S. at 692-93 (emphasis added).

It has been recognized by some circuit court decisions that a failure to provide material to which a defendant is entitled under the Jencks Act may adversely affect a defendant's "ability to cross-examine Government witnesses and thereby infringe upon his constitutional right of confrontation." *Krilich v. United States*, 502 F.2d 680, 682 (7th Cir. 1974). *United States v. Cleveland* (II), 507 F.2d 731, 740-41 (7th Cir. 1974); *United States v. Aaron*, 457 F.2d 865, 869 (2d Cir. 1972); *United States v. Missler*, 414 F.2d 1293, 1303-04 (4th Cir. 1969).

An important and recognized function of the cross-examination process guaranteed by the Sixth Amendment is the right to put to a witness questions "directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. at 316.

In *Davis*, defendant was prohibited from asking the state's key witness, Richard Green, questions concerning Green's juvenile record. The state of Alaska, by statute and rule, prohibited disclosure of a juvenile record. Davis was not seeking introduction of the juvenile record as impeachment of Green's character as a truthful person, but rather to show that at the same time Green was assisting the police he was a probationer; and from there to argue that Green was

acting out of concern over loss of his probationary status and thus was vulnerable to "undue pressure from the police."

In reversing Davis' conviction, this Court stated:

> "On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which ' "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 . . .' *Smith v. Illinois*, 390 U.S. 129, 131 (1968)." *Id.* at 318.

This Court refused to indulge in the exercise of attempting to evaluate the effect of the denial of this Sixth Amendment right to Davis or on the probable outcome of his trial: "[w]e cannot speculate whether the jury as sole judge of the credibility of the witness would have accepted . . ." Davis' theory had it been presented. *Id.* at 317; *accord, Smith v. Illinois*, 390 U.S. at 131; *Alford v. United States*, 282 U.S. at 692. This Court's concern in *Davis*, as in *Smith* and *Alford*, was that the jury have the benefit of Davis' right to probe the influence of a possible bias in the testimony. "[Alaska's] policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.* at 320.

The witness Green in *Davis* was not unlike the witness Newman in the instant case. Green was the key witness for the state in *Davis*; Newman was the key

witness for the Government here. Both of them were vulnerable–Green as a probationer, Newman as someone who was committed to pleading to a felony while hoping for less and obviously seeking to curry the favor of the prosecution. In *Davis* there was a statute and court rule on which the state relied to foreclose this avenue of cross-examination. Here, the prosecutor asserted the claim of "work product" to withhold obviously relevant materials from petitioner's inspection. In *Davis,* defendant "was permitted to ask Green *whether* he was biased but counsel was unable to make a record from which to argue *why* Green might have been biased *or* otherwise lacked that degree of impartiality expected of a witness at trial." *Id.* at 318. Here, petitioner's efforts to get the impeaching materials were foreclosed when petitioner was refused access to them and could obviously ask no questions about them or their contents. Petitioner was in fact more grieved by the trial court's ruling than was Davis in that case. Davis' attack went to the witness' bias only. Here, to the extent materials contained contradictory matters to the witness' testimony on direct examination, they were classic impeachment. As stated C. in McCormick, *Evidence* §34, at 68 (1972):

> "The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises doubt as to the truthfulness of both statements."

Further, to the extent that they exposed the extent of Newman's assistance as so vividly portrayed by the Government in its brief to the Ninth Circuit at 64

(discussed *supra,* footnote 29), they demonstrate Newman's vulnerability to undue pressure from the Government.

The effect of the trial court's ruling in *Davis* and in petitioner's case was the same, *viz.*, the inability to put matters concerning the witness' credibility before the jury thus denying the petitioner in each case his vital Sixth Amendment right to confrontation.

CONCLUSION

The decision of the court below should be reversed and petitioner granted a new trial for the reasons set forth herein.

DATED: August 20, 1975

Respectfully submitted,

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APPENDIX

EXHIBIT 1

1. Ipsissimis verbis conversations with petitioner in testimony:

J131, J132, J133, J134, J137, J138, J139, J140, J150, J153, J154, J167, J168, J170, J176, J177, J191, J194, J204, J212, J213, J230, J232, J259, J260, J263, J264, J267, J268, J269, J270, J271, J272, J276, J277, J291, J292, J293, J294, J295, J296, J299, J302, J311, J317, J318, J335, J341, J348, J349, J354, J356, J361, J362, J365, J366, J368, J382, J383, J385, J397, J398, J399, J407, J408, J410, J430, J432, J433, J435, J436, J439, J440, K3, K4, K21, K24, K29, K37, K47, K50, K55, K58, K67, K68, K69, K82, K84, K100, K106, K111. (Total: 91 pages)

Ipsissimis verbis conversations with petitioner in pretrial statement:

22, 39, 51, 52, 67, 70, 71 and 75. (Total: 8 pages)

2. Transcript pages of exhibit discussion in testimony:

Page	*Exhibits Discussed*
J134-5	3N-4, 3N-5, 3M-6, 3M-7
J140-43	5-H
J143-44	3M-01
J144-46	3FF-26
J146-150	3M-03
J150-1	5A
J152-53	5B
J155-56	3FF
J156-60	3M-01
J160-61	3M-03
J163-64	5H
J165-67	3GG

J172-74	3GG-25
J182-86	3Q-16
J186-87	3Q-17, 3Q-18, 3Q-19, 3Q-20
J195-97	25A, 25B, 25C, 3EE
J197-206	25D
J206	25E
J208-10	25F
J213-15	3EE
J215-18	25C
J221-25	3J, 3J-22, 3J-23, 3J-24, 3J-25, 3J-26, 3J-27, 3J-28, 3J-29, 3J-30, 3J-31
J226-30	3EE
J-236-42	32A
J244-45	1C
J261-62	4F
J273-74	10L
J282-84	10J
J285-89	3X-16
J297	3W
J305-06	10J
J306-09	3GG, 3H-32
J309-10	6L, 6M, 6N, 6O, 6P
J310-16	10M
J325-26	12A
J326-27	3W
J327-30	3GG, 3T-39
J330-333	3X
J336-38	3X
J338-40	6A, 6B, 6C, 6D, 6E, 6F
J350-53	3AA
J357-58	10F
J358	3GG

J359-60	10F-6, 3U-44, 10F
J362-63	7M, 7N, 10D
J363-64	10C
J364	6A, 6B
J369-70	23D, 23E
J370-71	13E, 13F, 13G
J371-72	14A, 23N, 23O
J372-74	3AA, 3GG, 3O-48, 3BB
J378-79	3I-56, 3GG-40
J379-80	10E-4
J380-81	10E-16
J381-82	10E-11, 10E-15
J383-84	10J
J391-93	3P-54
J393-94	3BB
J394-95	3P
J395-404	K15
J412-13	3GG
J413-17	3R-72, 3R-73
J417-18	3DD, 28B
J422-25	3AA
J425-27	23N, 23O
J427-31	13A
J431-32	26I
J436-37	3GG
J437-48	31E
J438-40	3F-78
K6	10C
K6-7	34C
K21-26	6Y
K26-31	10D, 10F
K33	10F
K34-40	3I-56, 8A, 8B

K40-51	7B, 7C, 7F, 7G
K51-56	10A
K56-60	12K
K64-67	20B, 3Z-34
K67-69	12A
K69-71	20A
K73-74	20A
K74-75	10B
K75-77	19A
K77-78	19B
K79-82	16C
K82-83	16D, 16E
K83-87	16F
K88-91	12F, 12G
K91-94	12N
K94-96	12G, 3I-39
K96-102	27G
K102-108	12G
K108-13	3L-69
K114-17	32B

(Total pages of exhibit discussion in trial testimony: 273)

(Total number of exhibits mentioned or discussed: 73)

In Pretrial Statement:

24-7	25A
27-8	25F
28-31	25C
35-36	4A
36-39	11A
44-46	11J
46-48	12I
48-52	10A
54-56	10B, 10D

56-58	10A
60-65	6A
65-66	6D
66-67	7A, 7B, 7C
68-71	20A, 20B
71-73	19A, 19B, 19C
73-75	30A, 30B
75-76	30C
76-79	8A, 3I-56
84-87	16C
87-89	16F

(Total pages of pretrial testimony exhibit discussion: 63)

(Total number of exhibits mentioned or discussed: 27)

3. Pages mentioning or discussing transactions with annuitants or lenders:

(1)	Royal Bank	-0-		(46)	J132-175, K7, K9
(2)	Brickey	-0-		(10)	J432-440, K2
(3)	Franklin/Williams Peters	-0-		(16)	J406-417, 429-432
(4)	Dixon	18-32	(15)	(41)	J190-230
	- Liberty Bank	25-27	(3)	(9)	J205-210, J213-215
(5)	Lambros	13-18	(6)	(23)	J175-187
(6)	Tucker	33-35	(3)	(38)	J256-262, J285-297, J321-338
(7)	Stacy	36-46	(11)	(27)	K95, K107-8, J324-338, K56-60, K88-91
	- Hylan	43-46	(4)	(3)	K89-91

(8)	Clark	49, 54, 58-73	(18)	(39)	K30-32, K42-43, K46-53, K66, K68-70, K73-75, J298-304, J306-312, J318, J356-57, J361-63
	- Mid-Continent	61-67	(7)	(12)	J338-346, K23-25
	- Kaw Investment	67-70	(4)	(8)	K47-52, K74-75
	- Sayles, Johnson County Bank	71-73	(3)	(8)	K65-66, K70-71, K73-78
(9)	Tager	-0-		(11)	J353-60, K33, K53, K75
	- Twin Cities State Bank	73-75	(3)	(1)	K27
(10)	Darden	-0-		(11)	J375-383, K53, K75
	- First National Bank	76-78	(3)	(5)	K36-40
(11)	Hoover	79-84	(6)	(25)	K79-82, J347-53, J364-75, J385, J428
	- Kenslow	82-89	(8)	(21)	J369-75, J384-87, J391-95, J424-28
	- Hunt	89	(1)		-0-
	- Friedman	-0-		(9)	K79-81, K83-88
	- Potter	-0-		(1)	K109

(12) Skillman	49,		J262-85,
	51-59,		J297-304,
	74, 75,		J204-06,
	80-82	(15) (65)	J310-15,
			J348-49,
			J353-56,
			J361-64,
			J376-77,
			J381-85,
			J397-404,
			K2-7, K29,
			K42-45,
			K46-49,
			K52-56,
			K74-75